Supreme Court, U.S.
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No. 98-1424

In The

Supreme Court of the United States

October Term, 1998

COLLAGEN CORPORATION,

Petitioner,

v.

CHARLOTTE KENNEDY and ROBERT KENNEDY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly reversed the trial court's granting of summary judgment below due to its abuse of discretion in excluding certain expert witness testimony under an inflexible application of *Daubert*.

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RULE

Supreme Court Rule 14.1(a) 1

OPINIONS BELOW

Respondents Charlotte and Robert Kennedy disagree with petitioner Collagen Corporation's inclusion of prior rulings and appeals of this case from 1990 through 1995 in Collagen Corporation's petition. The lengthy history and prior appeals in this case have no bearing on Collagen Corporation's petition and present nothing for review by this Court.

The only relevant and viable ruling before this Court is the Ninth Circuit's ruling of December 7, 1998.

STATEMENT OF THE CASE

Respondents respectfully request that this Court deny the petition for writ of certiorari filed by petitioner, which seeks review of the Ninth Circuit's opinion below. The Ninth Circuit Court of Appeals opinion appears at 161 F.3d 1226.

At the onset, respondents would note that the petition contains improper form and content and should not be considered by the Court; specifically:

(a) The "Questions Presented" portion violates Supreme Court Rule 14.1(a) in that it is argumentative, repetitious and unnecessarily detailed.

(b) The "Statement of the Case" contains extraneous and argumentative discussions of the two prior appeals of this case, neither of which has any bearing on this petition and both of which were appealed to this Court and denied. Petitioner raises particularly lengthy arguments regarding the Ninth Circuit's 1992 ruling in this

case, the review of which was denied by this Court on June 28, 1993 under No. 92-1505. The Court has no jurisdiction to re-review such ruling, and it should not have been made a part of this petition.

(c) The "Statement of the Case" improperly argues the law, facts and rulings below to a degree where correction by respondents would be unreasonably cumbersome for the Court. Respondents instead state that Charlotte and Robert Kennedy filed suit against Collagen Corporation seeking damages for injuries caused by petitioner's product. Petitioner filed for summary judgment, alleging that the testimony of expert witness Joseph Spindler, M.D., was inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The trial court agreed, granted summary judgment and dismissed the case. The Ninth Circuit reversed, and ruled that the trial court abused its discretion in failing to consider relevant scientific evidence relied on by Dr. Spindler to support his opinions. In holding that the reliability of Dr. Spindler's methodology was supported by "objective, verifiable evidence that the testimony [wa]s based on scientifically valid principles," the Ninth Circuit enumerated the objective, verifiable evidence he relied upon and the reliable methodology he applied, utilizing *Daubert* and the federal rules of evidence.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Ninth Circuit's opinion is consistent with the Court's decisions in *Daubert* and *Kumho*, and no conflict is shown.

Petitioner's complaints are two-fold: first, that the lower courts failed to require "independent validation" of the expert testimony in addition to "objective verification", and second, that the appellate court incorrectly applied the facts to the law. Neither complaint gives rise to a need for review by this Court.

In an apparent effort to distinguish the legal holding in this case from that of *Daubert*, petitioner fashions a specious argument that "independent validation" of an expert's methodology is a wholly-different criterion than the "objective verification" required by *Daubert*. Petitioner, disagreeing with the Ninth Circuit's reference to numerous factors giving rise to objective verification of the reliability of Dr. Spindler's methodology, argues that respondents failed to additionally provide independent validation of Dr. Spindler's methodology.

Petitioner fails to cite any source for "independent validation" as being a separate factor above and beyond "objective verification." Respondents contend that they are one and the same. The cases cited by petitioner at footnotes 5 and 6, page 24, reflect requirements of "objective, independent" validation or verification of the witnesses's methodology; nothing supports a position that these are two separate and exclusive criteria.

Nor does the Court's most recent *Daubert*-related decision in *Kumho Tire Co. v. Carmichael*, ___U.S.___, No.

97-1709 (March 23, 1999), require a specific finding of "independent validation" by the trial court in addition to "objective verification" of the reliability of expert witness methodology. Simply put, there is no such requirement and no conflict among the circuits regarding such non-existent issue.

The Ninth Circuit, as per *Daubert*, cited ample evidence of "objective verification" regarding Dr. Spindler's testimony. The decision below turns upon its own facts and does not present any legal issue of significance or conflict, and would have little, if any, significance for other litigants or courts.

The Ninth Circuit's ruling of December 7, 1998 carefully followed this Court's opinion in *Daubert* in both spirit and letter of the law, and should not be disturbed. It is also wholly consistent with *Kumho*, and in fact, adheres to this Court's admonitions that the *Daubert* factors are not exclusive and that a flexible approach must be used, taking into account the expert's particular knowledge and discipline, which the trial court here failed to do.[1] *Kumho*. The petition is without merit, and should be denied.

2. Neither the decision below nor the record raises the issue of "independent validation," and the issue is not properly before this Court.

Regardless, petitioner's argument that "independent validation" must be shown in addition to "objective

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[1] To the extent that petitioner argues that Dr. Spindler's testimony was required to follow *Daubert*'s enumerated "laundry list" of specific factors, this argument was rejected by *Kumho*.

verification" of the methodology in question must fail, as this was never argued below and was not ruled on. The petition contains arguments not presented to the trial court or court of appeals, and is not before the Court. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) ("question presented in petition but not raised in court of appeals is not properly before us").

The petition is without merit and should be denied.

3. The Ninth Circuit did not hold that petitioner had the burden of proving unreliability of the expert's methodology.

Petitioner misconstrues the opinion below, if not simply misreads it. Nothing in the Ninth Circuit's decision states or suggests that it was petitioner's burden to prove that Dr. Spindler's methodology was unreliable. The sentence quoted by petitioner at page 26 of its petition simply notes that petitioner did not present any evidence *disputing* the reliability of Dr. Spindler's methodology. This is underscored by the Ninth Circuit's immediately-following reference to *Ambrosini v. Labarraque*, 101 F.3d 12 (D.C. Cir. 1996), *cert. dismissed*, ___U.S.___, 117 S.Ct. 1572 (1997), as "noting that lack of contradictory evidence supported admissibility of expert's opinion regarding causation." This was an evidentiary issue, not a burden of proof issue.

The court of appeals correctly placed the burden of proof on respondents, and no conflict or inconsistency exists. The petition is without merit and should be denied.

4. This Court refused to review petitioner's state law arguments in 1993, and the issue is moot.

Petitioner's allegations of insufficiency of Dr. Spindler's opinion on medical causation under California state law was rejected by the Ninth Circuit in 1992. *Collagen Corporation v. Kennedy*, No. 91-15597, unpublished opinion dated September 8, 1992, appearing as Appendix E to the Petition for Writ of Certiorari. Collagen Corporation appealed this ruling to the U.S. Supreme Court under Petition No. 92-1505, which was denied by the Court on June 28, 1993.

The Ninth Circuit ruled in 1992 that Dr. Spindler's testimony was sufficient under California state law to establish medical causation; the Ninth Circuit's 1998 ruling did not change or address such issue and cannot be argued as establishing a standard different from state law. As a result, the basis for petitioner's complaints regarding state law has already been presented to this Court and denied by prior petition, a controlling fact which petitioner failed to disclose to the Court in its petition.[2]

The Court has no jurisdiction to re-review its 1993 decision, and the issue is moot. The Ninth Circuit's current ruling below does not modify or discuss such state law issue anew, and nothing is presented for review.

The petition is without merit and should be denied.

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[2] Indeed, respondents would argue that this constitutes the law of the case for all purposes.

CONCLUSION

Respondents Charlotte and Robert Kennedy respectfully request that writ of certiorari be denied.

Respectfully submitted,

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